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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 128

Petition not granted

ROBERT RISBERG,

Petitioner,

vs.

DULUTH, MISSABE & IRON RANGE RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Donald D. Harries

W. O. Bissonett, adm. 4. Oct. 45

Counsel for Respondent.

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Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel for petitioner claims that the Court below erred:

1. In construing the Federal Safety Appliance Act to be inapplicable to this case.

2. In affirming the Order of the Trial Court which denied petitioner's motion for a new trial, after a directed verdict for respondent.

In support of alleged error No. 1, petitioner cites the case of *Bradey* vs. *Terminal Railroad Association,* 303 U. S. 10. In the *Bradey* case both the Wabash Railway, the owner of the car, and the Terminal Railway Association, the user of the car, were interstate carriers engaged in

interstate commerce at the time the car with the defective handhold was placed on the Wabash tracks for inspection. Both Railways were subject to the Federal Safety Appliance Act. The question involved was not whether the Safety Appliance Act applied, but rather against whom, of the two interstate carriers, it should be applied. It is submitted that that was what Chief Justice Hughes had in mind when he said:

> "* * * The statute gives no ground for holding that it was the intent of Congress that in a situation such as here presented neither the Wabash nor the Terminal Association should be subject to the statutory duty. * * * The car was still in use, though motionless. * * * In view of that use, either the Terminal Association or the Wabash was subject to the obligation imposed by the statute." (303 U. S. at p. 13.)

While the car involved herein, flatcar No. 6286, was in the quarry of the Zenith Dredge Company, and at the time of the accident, it was not engaged in any kind of commerce as far as the defendant was concerned; nor was it being used by the defendant within the meaning of our contemplation of the Federal Safety Appliance Act.

Counsel's contentions, if they were carried to a logical conclusion, would tend to establish the fact that plaintiff was covered by the Federal Employers' Liability Act as well as the Federal Safety Appliance Act. But, in order for plaintiff to come within the provisions of the Federal Employers' Liability Act, two things must concur: First, the offending common carrier by railway must be engaged in interstate commerce; and second, the injury must be suffered by the plaintiff while employed by such carrier in such commerce. *Frazier* v. *Hines,* 260 Fed. 874; *Lewis* v. *Denver Ry. Co.,* 131 Minn. 122, 154 N. W. 945.

The effect of the 1939 amendment (53 Statutes 1404, 45 U. S. C. A. Section 54) to the Federal Employers' Liability Act, which provides that a carrier's employee shall not be held to have assumed the risks of his employment in any case, where injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of the carrier, is to obliterate from the law every vestige of the doctrine of assumption of risk and to prevent any reliance on that doctrine for the purpose of establishing absence of negligence on the part of the employer.

The result of the amendment is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed. The Act abolishes all of these defenses and authorizes the doctrine of comparison of negligence instead of barring an employee from all recovery because of contributory negligence. For practical purposes, the only question involved is whether the carrier was negligent and whether that negligence was the proximate cause of the injury. *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 87 Law ed. 610.

The Act is really a Federal Workmen's Compensation Act without a top limit for injuries or death.

Counsel seeks for plaintiff the benefit of all the rights conferred by the Federal Employers' Liability Act upon an employee of a common carrier engaged in interstate commerce who sustains injury arising out of and in the course of his employment. That is evidenced by the fact that practically all his citations of authority deal with the employer-employee relationship while both are engaged in interstate commerce.

There is a reason why counsel seeks these benefits. He wants to bring the plaintiff within the rule laid down by the employer-employee cases cited in his brief; those cases

which hold that all an employee has to prove is that he operated the brake with due care in a normal, natural and usual manner, and that it failed to stop the car in time to avoid injury. It should be noted that in all those cases the car involved in the accident was being handled by the defendant Railway Company on its own line, by its own locomotive equipment, and in the usual course of its business.

Perhaps it should be pointed out here that counsel in his brief reiterates over and over that plaintiff operated the hand brake with due care, in a normal, natural and usual manner, and the brakes did not work. He ignores the fact that this operation began on a 3.66% grade; that the car was loaded with more than 33½ tons of rock, with an overload of 2.7 tons; that while on this steep grade Mr. Long moved the crane toward the car to give them slack in the coupling; that plaintiff said the car started moving as soon as it was released by the crane; that he did not remember how many feet it moved while he was taking up the slack with his hands, but that the car was going pretty fast.

Defendant had nothing to do with the facts above outlined, and those facts certainly rule out of counsel's statement the words "with due care" as well as the words "in the normal, natural and usual manner". With such dangerous conditions confronting plaintiff, if he had used due care he would have had the slack taken out of the hand brake before the crane ever let go of the car and he would have been applying pressure with the brake club the instant the car was released from the crane. That conduct would have been described as handling the car "with due care". These large flatcars loaded beyond the limit of their capacity, standing out in sub-freezing weather for many hours, on a grade of nearly four feet to the hundred feet, are not playthings which may be turned loose with abandon. They must be handled carefully from the start, and to do other-

wise, as was done here, simply invites disaster. Under the foregoing circumstances the most efficient brake in the world could fail to stop the car in the short distance the car had to travel before striking the other cars.

The evidence conclusively establishes in this case that the car upon which plaintiff was injured was delivered to the Zenith Dredge Company on December 10, 1947. It was retained by that Company for three days, during which time it was handled by the locomotive equipment of the Zenith Dredge Company, including a steam locomotive and a Diesel crane. The evidence proved that when the car was taken up to the floor of the quarry it was handled with air brakes, and when the car was brought down from the floor of the quarry for delivery to the defendant it was handled with air brakes. As has already been pointed out, the car was equipped with hand brakes and air brakes that complied in all respects with the requirements of the Federal Safety Appliance Act. Under those circumstances the trial court properly held that it was not enough for plaintiff to show that the car was equipped with what he called "inefficient hand brakes"; he must show in what way they were inefficient by pointing out some mechanical or structural defect.

If the plaintiff were entitled to go to the jury in this case, his right was not predicated upon a statutory liability but upon common law liability. Under the common law plaintiff was required to show in what manner the brake was inefficient and show the defect which caused the inefficiency. Since he failed to establish a defect or inefficient brake in any manner whatsoever, to meet the requirements of the common law, he was not entitled to go to the jury on the claim that the brakes were not efficient as required by the Federal Safety Appliance Act. This was particularly true if one but took into further consideration the fact that the

flatcar had been in the possession and use of the shipper for three days; that it was overloaded; that it was given a push by the crane before it started on its steep gravity run; and that it was in the hands or under the control of a brakeman whose record of handling such loaded cars did not extend over a very long period of time.

The Zenith Dredge Company is, of course, not a common carrier engaged in interstate commerce. The Federal Safety Appliance Act does not apply to it. Its liability to its employees for injuries growing out of its operation of an engine and cars over its three-mile system of tracks, as well as for other injuries sustained by its employees is governed by the Workman's Compensation Act of Minnesota. That being true the primary question to be determined here is whether an employee of the Dredge Company, injured in his line of duty, may recover under the Federal Safety Appliance Act against respondent, the owner of the car, but who was not hauling or permitting it to be hauled or using or permitting the car to be used with a claimed defective brake on its own line at the time of the accident.

The Supreme Court of Minnesota answered that question in the negative, and the Chief Judge of the United States District Court of the District of Minnesota, Fifth Division, answered the same question in the negative in the case of *Paul* vs. *Duluth, Missabe and Iron Range Railway Company,* 96 Fed. Supp. 578, referred to on page twelve of the petitioner's brief. While it is true that the *Paul* case was submitted to the jury, it should be noted that Chief Judge Nordbye submitted the case to the jury only upon the question of common law negligence and not upon the theory of the applicability of the Federal Safety Appliance Act. Counsel for petitioner alleged that as error and after the jury had returned a verdict for the defendant, he moved for a new trial upon the ground that Judge Nordbye had erred in taking away from the consideration of the jury the ques-

tion of the applicability of the Federal Safety Appliance Act. In the Order denying the motion for a new trial, Judge Nordbye said:

> "* * * Plaintiff urges the applicability of the Safety Appliance Provisions of the Federal Employers' Liability Act. His position in this regard is clearly untenable. * * * At the time of this accident, the cars were not being used on defendant's railroad. They had been delivered to the Zenith Dredge Company and remained under the latter's exclusive control an appreciable time before the accident. * * * In view of the plain wording of the Safety Appliance Act, this Court has no right to extend its protection to employees of a quarry company which may be operating cars of a common carrier on the private tracks of the quarry company at a time when the cars, tracks, and the crew are in exclusive control of that company and have been for an appreciable period of time."

It is submitted that it is clear under the facts of this case that the Federal Safety Appliance Act has no application. At the time of the accident, the cars were not being used by respondent on respondent's railroad. They had been delivered to the Zenith Dredge Company and had remained under the exclusive control of that company an appreciable length of time before the accident. The movement of the car at the time of the accident was conducted exclusively by the crew of Zenith Dredge Company of which crew petitioner was a member. It is common knowledge that many things may have happened to this car and the brake mechanism thereon after the same was delivered to Zenith Dredge Company. There is no testimony that the car was in the same condition at the time of the accident as when it was delivered. In view of the plain wording of the Safety Appliance Act the Trial Court had no right to extend its protection to employees of a quarry company operating cars of a common carrier on the private tracks of

the quarry company at a time when the cars, tracks, and crew were in the exclusive control of the quarry company, which exclusive control had extended for an appreciable period of time before the accident. There is nothing in the Employers' Federal Liability Act which would even suggest that Congress intended to extend the benefits of the Act to the petitioner under such circumstances.

In view of the arguments and citations submitted herein in answer to specification of error No. 1, it is not necessary to spend much time or argument in answer to specification of error No. 2. It is clear that the reason the Supreme Court of Minnesota affirmed the Order of the Trial Court denying petitioner's motion for a new trial was because petitioner had not made out a Cause of Action under the common law. He did not prove any issue that could be submitted to the jury. He did not prove any of the allegations of his complaint and the Trial Court rightly directed a verdict for the defendant at the close of the evidence.

Conclusion

It is respectfully submitted that there was no error committed either by the Trial Court or the Supreme Court of Minnesota in any of the respects alleged by the petitioner in his brief and, therefore, the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

W. O. Bissonett,
Attorney for Respondent,
700 Wolvin Building,
Duluth 2, Minnesota.